Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

VAUGHN BRADFORD,

Petitioner,

v.

D.K. SISTO, Warden, California State Prison, Solano, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a juror admitted that he based his guilty verdict on bias and petitioner alleged that he did not discover the juror bias, in the exercise of reasonable diligence, until shortly before he began his second round of state collateral relief petitions, did petitioner made a prima facie showing to support the filing of a successive petition under 28 U.S.C. section 2244(b(2)(B)?

2. Where no new facts or legal authority was presented to the magistrate after the Ninth Circuit granted petitioner's motion to file a second or successive petition, did the magistrate have the authority under 28 U.S.C. section 2244(b)(3)(E) and 28 U.S.C. section 2244(b)(4) to dismiss the petition simply because he disagreed with the Ninth Circuit?

3. Did the "ends of justice" require the Ninth Circuit to hear the second or successive petition?

LIST OF ALL PARTIES

Petitioner

VAUGHN BRADFORD.

Respondents

D.K. SISTO, Warden, California State Prison, Solano, and PEOPLE OF THE STATE OF CALIFORNIA.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

None of the decisions were published.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: April 16, 2010 (memorandum decision).

2. Date of any order respecting rehearing: August 10, 2010

3. Date order sought to be reviewed became final: September 7, 2010.

4. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . :

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

Federal Statutes

28 U.S.C. section 2244(b).

Finality of determination

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish

by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a

second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. section 2254(a).

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254(a).

2. Related and similar cases

None.

3. Statement of the Case

a. Facts of Conviction and Custody.

Petitioner was convicted of first degree murder and sentenced on February 7, 2003 to a term of 26 years to life. He is presently in the custody of respondent Roanne Campbell, Warden, Mule Creek State Prison, Ions, California. Petitioner is not on bail.

b. Conviction and first round of appeal / habeas petitions.

Following a jury trial in the Superior Court of the State of California, County of Yuba, petitioner was convicted of first degree murder, California Penal Code section 187, with a deadly weapon enhancement under California Penal Code section 12022(b). [1](E.R. 19-20.) On March 31, 1983, petitioner was sentenced to prison for a term of 31 years to life. He filed a timely state court appeal. (E.R. 20.)

On September 23, 1984, the Court of Appeal for the State of California affirmed petitioner's conviction but struck a five year enhancement, reducing petitioner's sentence to 26 years to life. (E.R. 20.) On January 17, 1985, the California Supreme

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[1] "ER" refers to the Ninth Circuit's Excerpts of Record.

Court denied review of the conviction.

Petitioner also filed habeas corpus petitions with the state courts, including the superior court, Court of Appeal, and the California Supreme Court.

After the conclusion of the state review process, petitioner also filed a federal habeas corpus petition in 1989, *Bradford v. Gomez*, 89-01638, raising different grounds than the grounds raised in the petition below. All previous petitions were denied. (E.R. 20.)

c. Newly discovered evidence of juror misconduct.

On June 17, 2004, petitioner filed a petition with the California Superior Court of Yuba County, alleging newly discovered evidence of jury misconduct. He supported the petition with a declaration of Leon Lambkin, one of the jurors at his trial. The facts supporting the claim of juror misconduct were as follows:

On the night of August 24, 1982, petitioner was attacked by the decedent in a bar in Marysville, California. The decedent had to be pulled off petitioner, who was on the ground being punched by the decedent. Petitioner left the bar. About 45 minutes later, the decedent and three other persons exited the bar and began walking down stairs leading from the bar to the street. Petitioner, accompanied by one other person, appeared at the bottom of the stairs and challenged the decedent to a fight. Decedent continued going down the stairs toward petitioner. A witness saw petitioner punch the decedent, who then complained that he had been stabbed. The witness

followed petitioner and saw him throw an object away. Police officers found a knife near where petitioner had appeared to throw an object away. The pathologist testified that the decedent died from a four inch long wound into the heart that could have been made by the knife found by the officers. Petitioner was convicted of first degree murder. (E.R. 21-23.)

On June 7, 2004, juror Lambkin signed a declaration stating that he had lived in the Marysville area for approximately 30 years before serving as a juror in petitioner's trial. He declared that he "was familiar with the part of town where Eddie's Bar was located. At that time, things were pretty wild downtown and most people didn't like that part of town very much." (E.R. 46.) Before the trial, Lambkin had also heard that petitioner had a reputation of being a "pretty rough guy" that people stayed clear of, and that petitioner had "beat up a few people and cut people in the past." He stated that the rumors were widespread in Marysville, were spread by farm workers who came into town on the weekends, and that "[everybody had been talking about it on the street." (E.R. 23, 46.)

When he was called for jury duty and heard petitioner's name, Lambkin "realized that he was the man whom I had heard rumors about. 'That's the guy everybody's been talking about,' I thought." (E.R. 23, 46.) Lambkin further declared:

> "When Bradford entered the court, my eyes lit up like a 100 watt bulb when I saw him, heard his name, and realized who he was. I didn't say anything to anybody. I didn't tell anyone. I felt shivers because I didn't want anybody to know because of possible repercussions. I was just scared to be in the same room with the guy. I

thought I might be threatened or something. If he got out, I didn't want to be part of it."

(E.R. 23-24, 47.)

Lambkin further declared that when asked during jury selection whether he knew about the case, he replied that he had heard rumors about a killing, but he didn't mention knowing about petitioner's reputation. Lambkin admits he intentionally withheld his knowledge of petitioner's reputation from the court. (E.R. 24, 47.)

Lambkin further declared that he thought of petitioner's reputation during jury deliberations, and that "as far as I was concerned, this is what mostly got him convicted of first degree murder, because of what I knew of his reputation for being that kind of person." (E.R. 46.) Other jurors were also independently aware of petitioner's reputation because they discussed petitioner's reputation during deliberations. The jury foreman told other jurors "more than once" to stick to the facts and not discuss petitioner's reputation. Lambkin finally declared that he doubted whether he had been able to separate his knowledge of petitioner's reputation from the evidence presented at trial. (E.R. 24, 47-48.)

Lambkin signed his declaration on June 7, 2004 (E.R. 48), ten days before petitioner filed his second habeas corpus petition, on June 17, 2004, in the Yuba County Superior Court. (E.R. 20.)

d. Second round of state habeas corpus petitions.

The superior court denied the second habeas corpus petition on July 9, 2004. On September 1, 2004, petitioner filed a petition with the Court of Appeal, alleging the same jury misconduct issue. The Court of Appeal denied the petition on February 10, 2005. On April 20, 2005, petitioner filed a petition for habeas corpus, with the California Supreme Court, alleging the same jury misconduct claim. The Supreme Court denied the petition on April 19, 2006. (E.R. 20.)

e. Petitioner's application for leave to file a second or successive petition.

On October 10, 2006, petitioner, represented by the late Frank Prandial of Sacramento, filed an application for leave to file a second or successive petition under 28 U.S.C. section 2244(b)(2).

In his application to this court, petitioner raised the jury misconduct claim described above. (E.R. 38, 39.) Petitioner argued that he satisfied the standard in 28 U.S.C. section 2244(b)(2)(B)(ii) because the presence of even a single biased juror would require a new trial. (E.R. 39.) Petitioner implicitly argued that he satisfied the standard under 28 U.S.C. section 2244(b)(2)(B)(i) as well because petitioner did not obtain the signed Lambkin declaration until June 7, 2004 (E.R. 48), ten days before petitioner filed his second habeas corpus petition. (E.R. 37, 48.) Attorney Prandial died on October 27, 2006, shortly after the application was filed. On December 7, 2006, the Ninth Circuit motions panel ordered a response. On

January 18, 2007, respondent filed its response, arguing that petitioner's application failed to justify a second or successive petition under 28 U.S.C. section 2244(b)(2)(B). (E.R. 50.) Respondent argued that none of petitioner's proposed new claims met the criteria of section 2244(b)(2) because petitioner had not shown that the factual predicate to either claim could have been discovered earlier through the exercise of due diligence. (E.R. 73, 87, 95-98.)

On January 24, 2007, petitioner's agent notified the clerk that Mr. Prandial had died and that petitioner would be requesting additional time to file a reply and appointment of counsel. Petitioner did not thereafter obtain new counsel or file a reply in the Ninth Circuit. On March 20, 2007, the Ninth Circuit granted petitioner's application for leave to file a second or successive petition. (E.R. 50-51.)

f. District court proceedings following Ninth Circuit's granting petitioner's motion to file successive petition.

Following this court's order, petitioner filed his habeas corpus petition in the Eastern District of California on April 9, 2007, raising the juror misconduct claim but not the claim of instructional error. (E.R. 15-53, see ER 16.)

Despite this court's order of March 20, 2007, the magistrate judge dismissed the petition on the grounds that it was not a proper second or successive petition. (E.R. 9-14.) In his order of dismissal, the magistrate judge acknowledged that the Ninth Circuit must have concluded that petitioner had made a prima facie showing that the juror bias claim could be addressed in a

second or successive petition under section 2244(b)(2)(B)(ii):

> "By allowing the instant petition to be filed under the new evidence standard of section 2244(b)(2)(B) - which contains the actual innocence requirement - it would seem that the Ninth Circuit implicitly concluded that all the elements of the standard had been met, including the actual innocence requirement of section 2244 (b)(2)(B)(ii). In authorizing the instant second or successive petition, it is safe to say that the Ninth Circuit did not base its decision on a claim of instructional error because such a claim would have been known to petitioner at the time of the initial state court trial and, as such, was not the product of newly discovered evidence. Petitioner never argued that any claim should be allowed due to a new rule of constitutional law. Thus, the Ninth Circuit must have been focusing on petitioner's juror bias claim."

(ER-12.)

However, relying on 28 U.S.C. section 2244(b)(4), the magistrate judge dismissed the petition on the grounds that the Ninth Circuit must have erred in granting petitioner's application because the application did not address actual innocence in discussing the juror bias claim. (E.R. 12.)

g. Ninth Circuit proceedings, second round

On April 16, 2010, the Ninth Circuit issued a memorandum decision affirming the magistrate. On June 1, 2010, petitioner timely filed a motion for rehearing / rehearing en banc

following an extension of time granted on May 10, 2010. On August 30, 2010, the Ninth Circuit denied the motion for rehearing/rehearing en banc. On September 7, 2010, the court filed its mandate, stating that "the judgment of this Court, entered April 16, 2010, takes effect this date."

ARGUMENT

1. Petitioner made a prima facie showing of "due diligence" and "innocence" under 28 U.S.C. section 2244(b)(2)(B).

a. Petitioner made a prima facie showing in his motion for leave to file a second or successive petition.

Petitioner made a prima facie showing of "due diligence" and "innocence" within the meaning of 28 U.S.C. section 2244(b)(2)(B).

28 U.S.C. section 2244(b)(3)(C) forbids a Court of Appeals from granting a motion to file a second or successive habeas corpus petition unless "the application makes a prima facie showing that the application satisfies the requirements of this subsection." To make a prima facie case, it must be "reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition." *Woratzek v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1999).

Thus, when the Ninth Circuit granted petitioner's motion for leave to file a second or successive petition, the Ninth Circuit must have found that it was "reasonably likely" that the

petition met the requirements of a second or successive petition under 28 U.S.C. section 2244(b).

Petitioner raised two claims in the motion before the Ninth Circuit:

a. Juror misconduct that was allegedly discovered long after petitioner's first round of review proceedings concluded.

b. A claim of instructional error.

The claim of instructional error could not have been "newly discovered" within the meaning of 28 U.S.C. section 2244(b)(2)(B), as it was (a) unexhausted in the State courts, and (b) would have been known and discoverable at the time of the conviction. Even if the Ninth Circuit had ignored the exhaustion issue, the instructional error claim could not have provided the basis for a second or successive petition unless it was based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as provided in 28 U.S.C. 2244(b)(2)(A.) Petitioner, however, did not argue any "new rule of constitutional law" in his motion before the Ninth Circuit. The only new authority he argued in support of instructional error was a California State court decision, *People v. Lasko* (2000) 23 Cal.4th 101, which was decided more than one year before he commenced his second round of state collateral relief petitions on June 17, 2004.

Thus, the only claim the Ninth Circuit could have relied on was the juror misconduct claim. Petitioner at least arguably acted diligently in commencing his second round of state collateral

relief petitions based on the information received from the juror, and no evidence has been presented that he lacked diligence in raising this claim.

Petitioner claimed that juror Lambkin was actually biased when sworn in as a juror based on Lambkin's declaration that he knew of petitioner's allegedly violent reputation and based his decision to convict petitioner upon this prior, off-the-record knowledge.

The presence of a biased juror supports the requirement of innocence under 28 U.S.C. section 2244(b)(2)(B)(ii). In *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 860, 130 L. Ed. 2d 808 (1995), the Supreme Court held that, in second or successive petitions involving newly discovered evidence of an independent constitutional violation, (i.e., not based on a freestanding claim of "innocence" alone), a petitioner need only demonstrate "probable innocence", defined as "new facts that raise sufficient doubt about guilt to undermine confidence in the result of the trial." *Schlup v. Delo*, 513 U.S. at 317. A state defendant is denied his constitutional right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution even if only one juror is biased or prejudiced. *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990), citing *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) and *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), cert. denied (1977) 434 U.S. 818. The constitutional standard is that a juror is impartial "only if he can lay aside his opinion and render a verdict based on the evidence presented in court." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984), accord, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984), *Smith v. Phillips*,

455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Accordingly, if even one juror admits that he was so biased that he could not be impartial, defendant has been denied the right to an impartial jury and his conviction is subject to automatic reversal. Since the presence of even a single biased juror on the jury requires reversal, a court could not have "confidence in the result" of petitioner's trial if juror bias was proven, meeting the "probable innocence" standard of *Schlup v. Delo*.

The mere concealment of relevant facts or the giving of false or misleading answers by a juror during the voir dire examination, without more, raises a presumption of prejudice. *Fields v. Woodford*, 309 F.3d 1095, 1106 (9th Cir. 2002), citing *Williams v. Taylor* (2000) 529 U.S. 420 (intentional concealment by a juror that his wife had been the victim of a rape similar to that charged in the case required an evidentiary hearing on the issue of implied bias), *McDonough Power Equip. v. Greenwood*, 464 U.S. at 556 (accord, if the true answer would have provided a basis to challenge the juror for cause.) But here, the juror concerned also admitted that he was actually biased because he admitted relying on his prior knowledge of petitioner's reputation in convicting petitioner. The juror's declaration made it "reasonably likely" that at least the juror misconduct claim met the standards of section 2244(b).

b. As no new evidence or legal authority was presented to the magistrate, the magistrate could not set aside the decision of the Ninth Circuit permitting a second or successive petition.

28 U.S.C. section 2244(b)(4) provides that the district court "shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." However, 28 U.S.C. section 2244(b)(3)(E) also provides that the grant of an authorization by a court of appeals to file a second or successive application "shall not be appealable. . ." or subject to any other review. The effect of these two subsections is that, while the district court is not prevented from later finding that the petition does not meet the requirements of section 2244(b), the district court may not simply disagree with the Ninth Circuit, since this would be a kind of review of the Ninth Circuit's decision. Thus, where the respondent presents no new evidence or legal authority in support of its motion to dismiss, the district court is not free to dispute the Ninth Circuit's finding that the petition is "reasonably likely" to meet the standards of section 2244(b).

This is, however, what the magistrate did below. Although the magistrate complained that petitioner had omitted the unexhausted jury instructional claim, it is clear that the Ninth Circuit could not have relied on the presence of this claim as justifying a second or successive petition.

Section 2244(b)(3)(E) is similar to the "law of the case"

doctrine that generally applies to habeas corpus petitions. *Jeffries v. Wood,* 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc) ("a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case"), *Murdoch v. Castro*, 489 F.3d 1063, 1067-1068 (9th Cir. 2007). Indeed, the law of the case doctrine specifically applies to successive petition issues. This was illustrated in *Nevius v. McDaniel*, 218 F.3d 940 (9th Cir. 2000). The Ninth Circuit had granted petitioner leave to file a second or successive petition based on a showing that a claim of instructional error relied on a new rule of constitutional law set forth in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), made retroactive by *Adams v. Evatt,* 511 U.S. 1001, 114 S. Ct. 1365, 128 L. Ed. 2d 42 (1994). The district court then rejected all of Nevius' claims for successive petition treatment including the instructional error claim. On appeal, the Ninth Circuit agreed with the district court, even though it had previously found that petitioner had made a prima facie showing concerning the instructional error claim. The Ninth Circuit explained, however:

> "The claim that led us to grant Nevius permission to file a second petition was that the reasonable doubt instruction given at his trial was unconstitutional under the standard later set by the Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990). That claim has been entirely undermined by our subsequent decision in *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir.), cert. denied, 525 U.S. 967, 119 S. Ct. 415, 142 L. Ed. 2d 337 (1998). There we upheld the constitutionality, under *Cage* and *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583(1994), of

> a Nevada reasonable doubt instruction identical to the one given at Nevius's trial. The law of this circuit thus forecloses Nevius's claim that his reasonable doubt instruction was unconstitutional."

Nevius v. McDaniel, 218 F.3d at 944. In short, the Ninth Circuit held that the instructional error claim, although arguable in 1996, was no longer arguable in 2000 because of an intervening change in the law.

There was no such intervening law or additional facts below that would have justified a departure from the Ninth Circuit's decision. Respondent asserted exactly the same authority as it asserted before the Ninth Circuit and presented no additional evidence on petitioner's alleged lack of diligence in timely raising his jury misconduct claims. The only difference was that petitioner's new attorney did not raise the unexhausted instructional error claim. This was immaterial, since the Ninth Circuit could not have relied on this unexhausted, unqualifying claim in granting petitioner's motion for leave to file a second or successive petition.

That a later panel of the Ninth Circuit disagreed with the earlier panel did not change anything. The later panel could not have chosen to disagree with the earlier panel, since this, again, would have been a form of review of the earlier panel's decision, which is prohibited under section 2244(b)(3)(E).

2. The "ends of justice" required the Ninth Circuit to hear the successive petition.

"[A] habeas court must adjudicate even a successive habeas

claim when required to do so by the ends of justice." *Schlup v. Delo* (1995) 513 U.S. 298, citing to *Sanders v. United States* (1963) 373 U.S. 1, 15-17. Although it is clear that the state has an interest in finality in criminal cases, "[c]onventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. at p. 8. "If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' [citations] access to the courts on habeas must not be thus impeded." *Id.* Based on these foundational concepts, it has long been settled that "res judicata is inapplicable in habeas proceedings." *Fay v. Noia* (1963) 372 U.S. 391, 423.

However, by the legislature's revision of section 2244(b), certain limitations were placed on the United States courts' authority to review habeas petitions that are deemed "successive" petitions. Because petitioner does not claim a "new rule of constitutional law, made retroactive" affects his case, section 2244(b)(2)(A), his claim must technically meet the requirements of the "innocence" subdivision of section 2244(b), under which he must establish:

> "[T]he facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."

28 U.S.C. section 2244(b)(2)(B)(ii). Petitioner must also establish under section 2244(b), that the facts underlying his

claim "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. section 2244(b)(2)(B)(i).

Despite the requirements of section 2244(b), the United States Supreme Court has "adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. at p. 319. In *Kuhlmann v. Wilson* (1986) 477 U.S. 436, seven Members of the Supreme Court "squarely rejected the argument that in light of the 1966 amendments [to section 2244, which contained no reference to an "ends of justice" inquiry], 'federal courts no longer must consider the "ends of justice" before dismissing a successive petition.'" *Schlup v. Delo*, 513 U.S. at p. 320, citing *Kuhlmann v. Wilson*, 477 U.S. at p. 451. Thus, it is apparent that, despite the requirements of section 2244(b), a United States court may hear a successive petition that does not technically meet the statutory requirements if the "ends of justice" require it.

Petitioner presents such a case. The juror's admission that he was actually biased presented a claim that constituted structural error and could not have been upheld under any theory of harmless error. Since structural error undermines the reliability of the fact finding process, the ends of justice required that petitioner's claim of jury misconduct be considered.

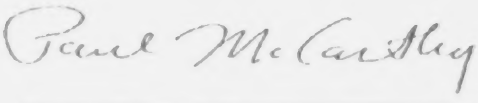
CONCLUSION.

With the evidence that petitioner presents to this court, there is no question that he was denied a fair trial. Based on Mr. Lambkin's declaration, it is clear that at least one juror, very likely a number of jurors, were biased against petitioner when they decided his case. Thus, there can be no confidence in the

result of the fact finding process.. Accordingly, this court should grant certiorari.

Dated: Oakland, California, Saturday, November 27, 2010.

Robert Joseph. Beles



Paul Gilruth McCarthy

Attorneys for *Petitioner* VAUGHN BRADFORD

FILED
MAR 20 2007
CATHY A. CATTERSON
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VAUGHN RAY BRADFORD, *Petitioner*, v. D. K. SISTO, *et al.*, *Respondent*.	No. 06-74805 ORDER

Before: CANBY, TROTT and FISHER, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court is granted. The Clerk shall serve a copy of this order, along with a copy of the application, on the district court.

:Further, the court was notified that petitioner's attorney of record, Frank Prandial, Esq., died on October 27, 2006. Petitioner may file a motion for appointment of counsel with the district court.

Petitioner shall submit a copy of this order with his habeas petition to the district court.

FILED
12/20/2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VAUGHN RAY BRADFORD, *Petitioner*, vs. D.K. SISTO, et al., *Respondents*.	No. CIV S-07-0681-CHK-P ORDER

Petitioner, a state prisoner proceeding with retained counsel, brings this petition for a writ of habeas corpus pursuant to 28 U. S.C. § 2254. Pursuant to the consent of the parties, this case is before the undersigned for final decision on respondents' motion to dismiss (Doc. 13).

This instant petition is petitioner's second habeas corpus case under 28 U.S.C. § 2254. His first habeas case was resolved on the merits against petitioner and the Ninth Circuit authorized the filing of this second petition under the gatekeeper provision, 28 U.S.C. § 2244(b)(3)(A). In this second § 2254 petition, petitioner raises one new claim – that a juror was actually biased and that the juror concealed the bias during voir dire.

In their motion to dismiss, respondents argue: (1) the claim raised in the second petition fails to satisfy the requirements of § 2244 for a second or successive petition because petitioner was not diligent in discovering the facts of his claim; and (2) the instant petition is untimely because it was not filed within one year of discovering the factual predicate of the claim. Petitioner argues that the Ninth Circuit's order authorizing the instant petition to be filed in this court forecloses respondents' arguments.

As to their argument that the instant petition fails to satisfy the gatekeeper provision, respondents first point to 28 U.S.C. § 2244(b)(4), which provided that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." According to respondents, this provision allows the district court to re-visit the Ninth Circuit's order authorizing the filing of the petition.

Respondents argue:

> In Nevius v. McDaniel, 104 F.3d 1120 (9th Cir. 1996), the Ninth Circuit concluded that the proper procedure under AEDPA was for the Court of Appeal to authorize the filing of an entire petition in which a prima facie case for qualification under Section 2244(b) was established, after which the district court could eliminate the claims that did not satisfy the requirements of the subsection. Id. at 1121-1122. Here, the Ninth Circuit found that Petitioner had made a

sufficient prima facie showing that this claim satisfied the Nevius standard.

Respondents misread Nevius. In that case, the petitioner had sought authorization from the Ninth Circuit to file a second or successive petition in the district court raising several new claims. After obtaining a response from the government and hearing oral argument, the court concluded that, as to petitioner's new jury instruction claims, the petitioner had made a prima facie showing that the challenged instruction was invalid based on a new rule of constitutional law made retroactive on collateral review. See id. at 1121 (citing 28 U.S.C. § 2244(b)(2)(A)). Based on this conclusion, the Ninth Circuit authorized the filing of petitioner's entire second habeas petition. See id. Addressing the government's motion for clarification, the Ninth Circuit explained that, under the gatekeeper provision, the Court of Appeals authorizes the filing of an entire second or successive petition if the provision is satisfied as to at least one claim in the petition. See id. The court contrasted this with § 2244(b)(4), which directs the district court, upon the filing of an authorized second or successive petition, to examine the other claims and to dismiss those which do not meet the gatekeeper requirements. See id. While, as discussed below, the court agrees with respondents' proposition that § 2244(b)(4) allows the district court to conduct its own gatekeeper review, Nevius does not necessarily support their argument.

Next, respondents argue that petitioner has failed to make a showing that the facts underlying the new claim, if proven, would establish that petitioner would not have been found

guilty but for a constitutional violation. See 28 U.S.C. § 2244(b)(2)(B)(ii). As the Supreme Court observed in Calderon v. Thompson, § 2244(b)(2)(B)(ii) requires that ". . . the facts underlying the [new] claim establish [the petitioner's] innocence by clear and convincing evidence." 523 U.S. 538, 558 (1998). Thus, the gatekeeper provision for claims based on newly discovered evidence requires that the claim go to actual innocence. Respondents argue that petitioner's new claim does not satisfy this requirement because, while juror bias may have resulted in a due process violation, it does not necessarily establish his actual innocence. In other words, even if petitioner's jury had not contained a biased juror, he still could have been convicted of the crime.

By allowing the instant petition to be filed under the new evidence standard of § 2244(b)(2)(B) – which contains the actual innocence requirement – it would seem that the Ninth Circuit implicitly concluded that all the elements of the standard had been met, including the actual innocence requirement of § 2244(b)(2)(B)(ii). In the Ninth Circuit application for leave to file a second or successive habeas petition in this court, petitioner argued: "In this matter a juror failed to disclose his bias towards petitioner during voir dire. Thus petitioner was denied due process, the right to present a defense, and the right to effective assistance of counsel." As to the actual innocence requirement, petitioner argued that he was the victim of instructional error regarding the elements of voluntary manslaughter. This was the first mention of a new claim based on instructional error.

In authorizing the instant second or successive petition, it is

safe to say that the Ninth Circuit did not base its decision on a claim of instructional error because such a claim would have been known to petitioner at the time of the initial state court trial and, as such, was not the product of newly discovered evidence. Petitioner never argued that any claim should be allowed due to a new rule of constitutional law. Thus, the Ninth Circuit must have been focusing on petitioner's juror bias claim. However, petitioner never made any argument as to whether the facts of that claim demonstrated actual innocence, which is the second requirement of the gatekeeper provision. Nonetheless, the Ninth Circuit permitted the second or successive petition to be filed. Simply put, the Ninth Circuit appears to have erred in concluding that the juror bias claim – purportedly based on new evidence – satisfies all the gatekeeper requirements. Specifically, no showing was made as to whether the claim goes to actual innocence. The Ninth Circuit's order contains no analysis.

While the instant second habeas petition does not present multiple claims such that, under Nevius, this court should review claims not considered by the circuit court, 28 U.S.C. § 2244(b)(4) nonetheless authorizes the district court to re-visit the gatekeeper requirements as to the sole claim presented. In particular, § 2244(b)(4) specifies that a district court ". . . shall dismiss any claim . . . that the court of appeals has authorized . . . unless the applicant shows that the claim satisfies the [gatekeeper] requirements. . . ." (emphasis added). Thus, this court may conclude that a claim fails to meet the gatekeeper provisions notwithstanding an order from the court of appeals allowing a second or successive petition.

It is troubling that petitioner apparently raised two claims to the Ninth Circuit, arguing that the instructional error claim showed actual innocence, but the instant second or successive petition only raises the juror bias claim about which no actual innocence argument was made to the Ninth Circuit. This is especially troubling given petitioner's current argument that the Ninth Circuit order should foreclose respondents' motion to dismiss. It seems that petitioner baited the Ninth Circuit into granting relief by presenting two claims, then switched to just one claim – to which actual innocence could not apply – when he filed the instant second or successive petition.

Here, as to the sole claim of juror bias presented in the instant second petition, petitioner cannot demonstrate that the facts underlying the claim establish his actual innocence. Regardless of what those facts are, at best they establish juror bias. However, as respondents argue, an unbiased jury could still have convicted petitioner. Thus, the claim fails to satisfy § 2244(b)(2)(B)(ii). Respondents' motion to dismiss should be granted for this reason.

Respondents also argue that the instant second petition is untimely in that it was not filed within one year of discovery of the underlying facts. Because the claim fails to satisfy the gatekeeper requirements, it is not necessary to determine whether it is timely.

Petitioner argues in opposition to respondents' motion that the issues raised in respondents' motion are foreclosed by the Ninth Circuit's order allowing the second or successive petition to be filed. However, because the Ninth Circuit's order

contains no analysis, it is not possible to determine the basis of the Ninth Circuit's decision and, therefore, what was and was not decided by that court. Further, as discussed above, it appears that the Ninth Circuit's implicit conclusion that all of the gatekeeper requirements were satisfied is wrong, at least with respect to the actual innocence requirement of § 2244(b)(2)(B)(ii) as applied to the sole claim raised in this case. Finally, § 2244(b)(4) permits this court to re-visit the court of appeals' authorization order.

This conclusion, which at first blush seems to contradict the Ninth Circuit's order, can be explained by petitioner's "bait and switch." The case presented to this court is not the same case presented to the Ninth Circuit in that the instant petition does not raise any claim based on instructional error, to which an actual innocence argument would apply.

Accordingly, IT IS HEREBY ORDERED that:

1. Respondents' motion to dismiss (Doc. 13) is granted; and

2. The Clerk of the Court is directed to enter judgment and close this file.

DATED: December 20, 2007

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

FILED
APR 16 2010
MOLLY C. DWYER,
CLERK U.S. COURT
OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VAUGHN RAY BRADFORD,

Petitioner - Appellant,

v.

D. K. SISTO; PEOPLE OF THE STATE OF CALIFORNIA,

Respondents - Appellees.

No. 08-15418
D.C. No. CV-07-00681-CHK

MEMORANDUM*

Appeal from the United States District Court for the Eastern District of California
Craig Kellison, Magistrate Judge, Presiding
Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

California state prisoner Vaughn Ray Bradford appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Bradford contends that the district court erred by dismissing his successive petition pursuant to 28 U.S.C. § 2244(b)(2), (4) because this court previously granted Bradford's motion to authorize the district court to consider his successive petition. However, this did not preclude the district court from determining that Bradford had not met the requirements for considering a successive petition. See United States v. Villa-Gonzalez, 208 F.3d 1160, 1164-65 (9th Cir. 2000) (per curiam).

Furthermore, the district court correctly concluded that, taking as true Bradford's new evidence of juror bias, the evidence was not "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added); cf. Babbitt v. Woodford, 177 F.3d 744, 747-48 (9th Cir. 1999) (stating that petitioner's claim of racial bias on part of defense counsel amounting to structural error would fail under the standard applicable to successive petitions at § 2244(b)(2)(B)(ii)).

Because the district court did not err in dismissing the petition, we decline to address Bradford's contention that remand to a different judge is required.
AFFIRMED.

FILED
AUG 30 2010
MOLLY C. DWYER,
CLERK U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VAUGHN RAY BRADFORD,

Petitioner - Appellant,

v.

D. K. SISTO, Warden, CSP - Solano and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents - Appellees.

No. 08-15418
D.C. No. CV-07-00681-CHK
U.S. District Court for Eastern California, Sacramento

ORDER

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED
SEP 07 2010
MOLLY C. DWYER,
CLERK U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VAUGHN RAY BRADFORD,

Petitioner - Appellant,

v.

D. K. SISTO, Warden, CSP - Solano and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents - Appellees.

No. 08-15418
D.C. No. CV-07-00681-CHK
U.S. District Court for Eastern California, Sacramento

MANDATE

The judgment of this Court, entered April 16, 2010, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer Clerk of Court
Rhonda Roberts Deputy Clerk